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Sayler Land Co. v. Tulare Lake Basin Water Storage District: Opening the Floodgates in Local Special Government Elections

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In judicial review of the constitutionality of representational structures at the local governmental level, each citizen's constitutional right to equal representation must be reconciled with the need for flexibility in designing local structures. Last term, in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[1] the Supreme Court faced this problem in the context of a water storage district. It upheld a statute that both restricted the franchise in the election of district directors to district landowners and allocated votes on the basis of the assessed value of the land owned by each voter.[2] This Note will first analyze the merits and deficiencies of the techniques that the Court used in dealing with problems of local elections prior to *Salyer* and, against that background, will discuss the techniques used in *Salyer* to reconcile the competing policies. It is the thesis of this Note that the *Salyer* method is suitable for resolving the tension between the need for local structural flexibility and the constitutional right to equal representation and that the result reached in that case was proper. However, as the discussion of *Salyer* will reveal, the method has a potential for misapplication. The determination of when the need for local flexibility should override the constitutional right requires a more careful examination of the relevant factors than the *Salyer* opinion indicates that the Court will perform. Although the result in *Salyer* seems sound, a superficial analysis in future cases could give inadequate protection to the constitutional right.

1. 410 U.S. 719 (1973).

2. A companion case, Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (per curiam), upheld a watershed district voting scheme that allowed only landowners to vote and weighted the voting according to acreage within the district owned by each voter.

The right to effective representation was developed by the Court in a series of opinions involving malapportionment or restrictions on the exercise of the franchise in federal and state legislative elections.[3] The Court subjected the justifications for such infringements to strict scrutiny under the equal protection clause[4] on the ground that

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3. The Court has essentially held that equal protection of the laws is denied when state legislative and congressional districts contain unequal numbers of people. In Wesberry v. Sanders, 376 U.S. 1 (1963), the Court held that the Constitution requires that congressional districting schemes be based on substantial equality of population among the various districts in order that the Constitution's fundamental goal of "equal representation for equal numbers of people" be achieved. 376 U.S. at 18. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court examined Alabama's malapportioned state representative districts and enunciated the requirement that the seats in both houses of the state legislature be apportioned on a population basis.

The Court occasionally couched its analysis in terms of the need to protect the right of each *voter* to equal participation in the political process via his ballot. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 566 (1964): "[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." However, the basic holdings of the reapportionment cases established the requirement that districts be apportioned so that they contain equal populations, and no attempt was made to ensure that equal numbers of people actually voted for each representative. Therefore, the basic requirement in apportionment could accurately be said to be a protection of the right to live in an equally apportioned district, the Court's functional definition of equal representation. For a full discussion of this point, see Note, *Reapportionment on the Sub-State Level of Government: Equal Representation or Equal Vote?*, 50 B.U. L. REV. 231 (1970).

4. By the time of Reynolds v. Sims, 377 U.S. 533 (1964), two standards of review had begun to evolve in equal protection cases. For a full discussion of these standards as used during the Warren Court era, see Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1968). For an earlier study, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

The first and older standard was the "rational relationship" test, which the Court has primarily used in considering social and economic regulations. Under this standard, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Two analytic steps are implicit in this approach: The statute must have a permissible legislative purpose, and the classification must be reasonably related to that purpose. *See* Note, *Developments in the Law—Equal Protection, supra*, at 1077-87. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552 (1947).

In certain cases, however, the Court has required the state to bear a heavier burden of justification. When the Court has detected that a "suspect classification" is present in the statute, it has subjected the classification to strict scrutiny and demanded that it be "shown to be necessary to promote a *compelling* governmental interest." Graham v. Richardson, 403 U.S. 365, 376 (1971), *quoting* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis original). Statutory classifications that have been regarded as "suspect" now include race, McLaughlin v. Florida, 379 U.S. 184 (1964), national origin, Korematsu v. United States, 323 U.S. 214 (1944), and alienage. Graham v. Richardson, 403 U.S. 365 (1971).

Similarly, when the Court has determined that a "fundamental interest" is involved, it has subjected the classification to the stricter test. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). Interests regarded as fundamental by the Court include the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942), the right to travel, Shapiro v.

the right to equal representation[5] is fundamental in a democratic society because it safeguards other important rights.[6] The Court's ideal was equal political influence for every citizen in the selection of members of general legislative bodies, for all citizens are equally affected by the decisions of those bodies. Equal population districting was chosen as the institutional standard that would best achieve that goal.[7] Unless deviations from this institutional norm could be justi-

Thompson, 394 U.S. 618 (1969), and the right to vote. Reynolds v. Sims, 377 U.S. 533 (1964).

With regard to the right to vote, in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court emphasized that "[t]he constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the Court noted in *Harper v. Virginia Bd. of Elections*, . . . 'the right to vote in state elections is nowhere expressly mentioned.'" 411 U.S. at 34 n.74, *quoting* 383 U.S. 663, 665. The *Rodriguez* Court also noted that "the protected right . . . to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population" is "implicit in our constitutional system." 411 U.S. at 35 n.78. *See also* Carrington v. Rash, 380 U.S. 89, 96 (1965) (right to vote "close to the core of our constitutional system"). The Court has applied strict scrutiny to cases involving the malapportionment of congressional districts, Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the malapportionment of state legislative districts, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964), and voter residency requirements. Dunn v. Blumstein, 405 U.S. 330 (1972).

In most cases the choice between the rational relationship and the strict scrutiny tests has determined the outcome of the case. The subjection of a statute to strict scrutiny has usually meant that the classification will be held invalid. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). *But cf.* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). In two recent decisions, 50-day voter residency requirements were sustained under the strict scrutiny test. Burns v. Fortson, 410 U.S. 686 (1973); Martson v. Lewis, 410 U.S. 679 (1973). Subjection of a classification to the rational relationship test has usually resulted in validation of the statute. *See* Note, *Developments in the Law—Equal Protection*, *supra*, at 1087. *But see* Morey v. Doud, 354 U.S. 457 (1957). For a discussion of several recent cases in which the Court has applied the rational relationship test in a more rigorous manner, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-20 (1972).

5. Although the Court has often seemed to be concerned with the need to protect the individual citizen's right to vote, *see, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("the right of suffrage is a fundamental matter in a free and democratic society"), the Court in *Reynolds* proclaimed that "achieving . . . fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." 377 U.S. at 565-66.

6. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62 (1964): "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement on the right of citizens to vote must be carefully and meticulously scrutinized." *See also* Yick Wo v. Hopkins, 118 U.S. 89, 96 (1886).

7. *See* note 3 *supra*. Commentators have criticized the Court for camouflaging the imposition of a standard of what constitutes a republican form of government under the guise of implementing the equal protection clause. *See, e.g.*, Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 243, 244 (1964) (the Court has centered its attention on a "specious conception of personal right rather than upon the

fied by a compelling reason, the Court mandated its implementation.[8] Only recently has the Court tolerated a slight deviation from strict numerical equality in state legislative redistricting when that was necessary to accommodate a state policy of preserving political subdivision lines.[9]

In *Avery v. Midland County*[10] the Court first required equal population districting for a general governing body at the local gov-

institutional aspect of the problem"); Note, *Reapportionment*, 79 HARV. L. REV. 1226, 1242 (1966) ("denying a person the right to vote is different from establishing electoral districts containing unequal population").

As many commentators have pointed out, a mathematically equal population districting scheme is not tailored to provide representation for all voters, for minority voters in a district will have no "representation" in the legislature. *See* Dixon, *The Warren Court Crusade for the Holy Grail of "One Man—One Vote"*, 1969 SUP. CT. REV. 219, 227. Proportional representation or "interest group" voting would guarantee that each voter has some representation. *See* Kauper, *supra*, at 227; Note, *supra*, at 1242. One commentator has countered criticisms of equal population districting as a vehicle for effective representation by arguing that a system of proportional or interest group representation would be antithetical to the American political tradition of compromise in that it would create sharp divisions on political issues. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 54.

8. The first case to articulate fully the basic standard of equal population districting was Wesberry v. Sanders, 376 U.S. 1 (1963), a case involving congressional districts. The Court struck down Georgia's congressional districting scheme on the basis of article I, section 2, of the Constitution, which requires that Representatives be chosen "by the People of the several States." The Court interpreted this section as requiring "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. For state legislative apportionment, the Court held, in Reynolds v. Sims, 377 U.S. 533 (1964), that the equal protection clause mandated that "a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. at 577. This was essentially the *Wesberry* standard, but the Court in *Reynolds* noted that there might be "[s]omewhat more flexibility . . . with respect to state legislative apportionment than in congressional districting." 377 U.S. at 578.

Since these early cases, the Court has further developed the standards to be applied to both congressional and state legislative districting. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Court noted that the "nearly as practicable" standard of voter equality enunciated in *Wesberry* for congressional districts requires that the legislature make a "good-faith effort to achieve precise mathematical equality . . . . Unless population variances among Congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." 394 U.S. at 530-31. *See also* Wells v. Rockefeller, 394 U.S. 542 (1969) (companion case). In Mahan v. Howell, 410 U.S. 315 (1973), the Court focused its attention on the standard to be applied in state legislative districting and noted that "the constitutionality of Virginia's legislative redistricting plan [is] not to be judged by the more stringent standard that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds v. Sims* . . . ." 410 U.S. at 324. Under the latter standard, the Court can take into consideration factors that could not be considered under the *Kirkpatrick* standard. The Court noted in *Mahan* that "[a]pplication of the 'absolute equality' test of *Kirkpatrick* and *Wells* to state legislative redistricting may impair the normal functioning of state and local governments." 410 U.S. at 323.

9. *See* Mahan v. Howell, 410 U.S. 315 (1973). The Court sustained a districting plan in which one district was overrepresented by 6.8 per cent and another was underrepresented by 9.6 per cent. 410 U.S. at 319.

10. 390 U.S. 474 (1968).

ernmental level. The Court found that, since units of local government are arms of the state and are becoming increasingly important to their citizens,[11] they are subject to the constraints of equal protection to the same degree as the state.[12] However, it was apparent even before *Avery*[13] that more specialized analytic tools would be

11. The *Avery* Court said:

"[I]nstitutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause, and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns and counties."

390 U.S. at 481.

12. The equal protection clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.

. . . .

. . . If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board or county governing board are elected from districts of substantially unequal population.

390 U.S. at 479-80.

13. Two cases decided before *Avery* demonstrate the Court's awareness that equal representation doctrines could not be automatically applied to local government. Sailors v. Board of Educ., 387 U.S. 105 (1967), involved a challenge to the validity of the electoral scheme for the Kent County (Michigan) School Board, the members of which were selected, not by the electors of the county, but by delegates chosen by the local school boards. Each board sent a delegate to a biennial meeting, and these delegates elected a five-member county board, the members of which were not required to be members of the local boards. The Court, assuming *arguendo* that the principles of *Reynolds* would apply to the election of local officials, held that this representational scheme was not subject to constitutional challenge on the basis of *Reynolds* because it was appointive, rather than elective. 387 U.S. at 111. The Court said that there was no reason why officials, such as the county school board members in *Sailors*, who were nonlegislative, could not be appointed instead of elected. 387 U.S. at 108. The Court left unresolved the question whether a local legislative body (such as a city council) could be appointed rather than elected. 387 U.S. at 109-10. For an interesting argument that elections might, in some instances, be required, see Nahmod, *Reflections on Appointive Local Government Bodies and the Right to an Election*, 11 DUQUESNE L. REV. 119 (1972).

The second case was Dusch v. Davis, 387 U.S. 112 (1967). That case arose out of the consolidation of the City of Virginia Beach with adjoining Princess Anne County, and the adoption of a borough form of government for the resulting unit. There were seven boroughs, with varying populations, in the consolidated city. The most populous contained 29,048 people, while the least populous had 733. The city charter, approved by the state legislature, provided that there were to be 11 councilmen for the city, all elected at-large. However, while four of the eleven could be elected without regard to residence, each of the remaining seven had to reside in a different borough. The Court held that this scheme did not violate the equal protection clause. The plan, the Court noted, used boroughs merely as a basis for residence and not for representation, so that, despite the residency requirement, each council member represented the whole city. 387 U.S. at 115. Nevertheless, it is clear that this plan gave the rural (and less populous) boroughs more representation on the council than sheer numbers would otherwise have allocated to them, because those council members residing in the less populous rural boroughs would presumably have more familiarity with rural problems and would in fact represent rural voters better than they would urban voters. The plan was an enticement for rural areas to enter the metropolitan government. *See* 387 U.S. at 117.

One commentator suggested after *Sailors* and *Dusch* that the Court was uncertain about its ability to remedy inequities at the local level without disrupting the pattern

needed to deal with the problems of representation in local government because local units vary in the functions they perform and in their effects on local residents.[14] Local units span a spectrum from those, such as school districts, that are functionally specialized to those, such as municipalities, that are responsible for a wide range of services. Any method of evaluating the constitutionality of voting schemes established for these widely variant institutions should recognize that, in some circumstances, the most appropriate representational structure might include unequal districting or restrictions, for these would give more influence to those citizens with the greater interest in the decisions of the local unit.[15]

In voting cases arising out of local elections, the Court has articulated three tests. Although each test was articulated in the context of a different local problem, all three are concerned with whether the unit in question has such widespread and universally important effects on the local population that any infringement on the franchise would be improper.

The earliest method used by the Court was adopted in *Avery*, a malapportionment case, where the powers of the unit in question, the County Commissioners Court, and the unit's impacts on the citizens were examined to determine whether deviations from equal population districting were permissible. The Court noted that the Commissioners Court exercised many important powers[16] and that

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of state government and further suggested that such problems may be more amenable to political than to judicial solutions. *See* Martin, *The Supreme Court and Local Government Reapportionment: The First Phase*, 35 TENN. L. REV. 313, 317 (1968).

14. There are approximately 80,000 different units of local government. Included are 3,043 counties, 17,996 municipalities, 17,144 townships, 18,332 special districts, and 25,000 school districts. COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING LOCAL GOVERNMENT 67 (1966). For surveys of the various possibilities for the formation, validation, and operation of special districts, see J. BOLLENS, SPECIAL DISTRICT GOVERNMENT IN THE UNITED STATES (1957); R. SMITH, PUBLIC AUTHORITIES, SPECIAL DISTRICTS AND LOCAL GOVERNMENT (1964); Hankerson, *Special Governmental Districts*, 35 TEXAS L. REV. 1004 (1957).

15. Many commentators were critical of the extension in *Avery* of one person–one vote to general local governing bodies. *See, e.g.*, Grant & McArthur, *"One Man–One Vote" and County Government: Rural, Urban and Metropolitan Implications*, 36 GEO. WASH. L. REV. 760 (1968); Martin, *The Supreme Court and Local Government Reapportionment: The Second Phase*, 21 BAYLOR L. REV. 5 (1969). These commentators foresaw that a strict one person–one vote rule could make it difficult to create an institutional framework that could solve regional problems by encouraging the participation of many differently sized units. The idea that population should not be the sole consideration in such cases was first expressed by Weinstein, *Effect of Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 1 (1965).

16. The Court concluded:

> The Commissioners Court . . . .
> "is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and

its decisions significantly affected every county resident.[17] Since the Commissioners Court had such "general governmental powers,"[18] equal population districting was required. The Court issued a caveat that "[w]ere the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body might be apportioned in ways which give greater influence to the citizens most affected by the organization's functions."[19]

As in the decisions on state and federal legislative apportionment, in *Avery* the Court grounded its requirement of equal population districting on the postulate that each citizen should have an equal voice in institutions that affect all citizens equally. In the local case, however, the Court was more careful in its analysis of the effects of the governmental unit on the citizens, in order to ensure that the norm of equal districting was in fact appropriate.[20] The Court recognized that, in local units where the impact on citizens is not uniform, other representational structures may be necessary, although it left unclear both the parameters of the situation in which a deviation from equal population districting would be allowed and the permissible extent of such a deviation. The inquiry into powers and impacts made in *Avery* is a suitable method for resolving representational problems at the local level in that it possesses a high degree of flexibility; the analysis focuses directly on the link between individual need and institutional structure that was the cornerstone of the state malapportionment decisions.

Even in a case that does not fall within the *Avery* caveat because the local unit possesses general governmental powers, some flexibility may be possible, as indicated by the Court's decision in *Abate v. Mundt*.[21] However, the margin allowed by that case is very narrow. *Abate* involved malapportionment in the electoral districts of a county legislative body. Although the Court found that deviations from population equality required careful scrutiny because of the

bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization of tax assessments."

390 U.S. at 476, *quoting* VERNON'S ANN. TEX. CONST. art. V, § 18, Interpretive Commentary (1955).

17. 390 U.S. at 484.

18. 390 U.S. at 484-85.

19. 390 U.S. at 483-84.

20. In *Avery* the Court analyzed the powers and impacts of the governmental unit to determine if the unit had "general governmental powers." No such analysis had been undertaken in the congressional and state legislative districting cases because of the readily apparent widespread and important impacts present in those cases.

21. 403 U.S. 182 (1971).

importance of voting rights, it tolerated an 11.9 per cent deviation from strict numerical equality.[22] The Court based this result on its finding that the plan that permitted this deviation would further cooperation between the county and its constituent towns and on the long history of that cooperation[23]—a historical argument that seems at odds with the Court's observation in the same opinion that flexibility is needed "to meet changing societal needs."[24] The Court also pointed out that the deviation did not discriminate against any particular group of voters;[25] it thus distinguished *Hadley v. Junior College District*,[26] an earlier local malapportionment case, where an apportionment scheme was struck down because it systematically discriminated against urban voters within a metropolitan district.[27] This distinction would indicate that the room for flexibility left open in *Abate* is much smaller than that hinted at by the *Avery* caveat, for *Abate* would not tolerate infringements resulting from the purposeful allocation of more political influence to a certain geographic area by giving it more heavily weighted votes, even if the nonuniform impacts standard of *Avery* were met. Thus, the flexibility of the *Avery* method, which might allow an exception from equal population districting where a local unit has a differential impact on various groups of citizens, would derive from the possibility that the unit would fall outside the parameters of the powers and impacts test, not from the possibility that purposefully discriminatory deviations could survive careful scrutiny.

The major difficulty with the *Avery* method stems from its very flexibility. Precisely because the phrase "general governmental powers" is ambiguous, it is difficult to apply, and the method is fraught with the danger of a misapplication that will not adequately protect the constitutional right to effective representation. The difficulty of applying the concept of "general governmental powers" to a functionally specialized unit is illustrated by *Hadley v. Junior College District*.[28] In that case the Court struck down a representational scheme for the election of trustees of a junior college district.[29] Even

22. *See* 403 U.S. at 184.

23. 403 U.S. at 186.

24. 403 U.S. at 185.

25. 403 U.S. at 186.

26. 397 U.S. 50 (1970).

27. 403 U.S. at 186. For a description of the apportionment system in *Hadley*, see note 29 *infra*.

28. 397 U.S. 50 (1970).

29. Missouri law allowed school districts by referendum to establish a consolidated junior college district and elect six trustees. The law also provided that the trustees were to be apportioned among the school districts on the basis of each district's "school enumeration" (pupils between the ages of 6 and 20). However, the apportionment scheme systematically discriminated against voters in the more populous districts.

though the Court admitted that the powers of the trustees were not so broad as those of the Midland County Commissioners, it found that their powers were numerous and affected all district citizens in such a way that equal population districting was required.[30] As in *Avery*, the Court reserved the possibility that "there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required . . . ."[31]

Although the *Hadley* Court based its holding on the *Avery* doctrine, its language suggests a less flexible test—that the decision to select officials by popular election is, in itself, sufficient to require equal population districting.[32] An inquiry into the importance to voters of the roles played by various officials and the purposes of particular elections was said to be too difficult;[33] the fact that an official is elected was found to be "a strong enough indication that the choice is an important one."[34] Unlike *Avery*, this second, or "popular election," method has the advantages of simplicity and ease of application.[35] Moreover, there is no danger, in the cases

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because whenever a large district's share of the total enumeration fell within a certain percentage range it was allocated the number of trustees corresponding to the bottom of the range, while the remaining trustees were elected at-large in the smaller districts. Thus, Kansas City had 50 per cent of the trustees but 60 per cent of the school enumeration. 397 U.S. at 56-57.

30. The junior college trustees had the power to "levy and collect taxes, issue bonds . . . , hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage operations of a junior college." 397 U.S. at 53. The Court said that "these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle we applied in *Avery* should be applied here." 397 U.S. at 53-54.

31. 397 U.S. at 56.

32. *See* 397 U.S. at 54-55. The "popular election" standard of *Hadley* was dicta, for the Court held that the facts fit within the parameters of the *Avery* doctrine. *See* note 30 *supra*.

33. "If the purpose of a particular election were to be the determining factor in whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task." 397 U.S. at 55.

34. 397 U.S. at 55.

35. The simplicity of the "popular election" test is somewhat negated by the failure of the Court to clarify the parameters of what it regarded as a "popular election." Since the *Hadley* case was one involving local *malapportionment*, the test clearly covers an election in such a case. A question of importance is whether it would also include a *restricted* election and thus encompass the situation presented in *Salyer*. An argument against such a reading is that the inference of important impacts on all citizens, which the Court drew from the use of a popular election in *Hadley*, could not be drawn from an electoral scheme in which only some citizens were enfranchised. The *Hadley* Court

where there is a popular election, that the test will provide inadequate constitutional protection for the individual citizen. The disadvantage of this method is that it does not inquire whether every citizen needs equally effective representation, but merely presumes, in some cases, that every citizen does. However, there may well be cases in which a unit's activities are so disproportionately concentrated in one geographic area within its boundaries that it might be desirable to give the more heavily affected area more political influence even though an area-wide election is held. Dissenting in *Avery*, Justice Fortas noted that the County Commissioners were primarily concerned with rural affairs, especially rural roads, and that they did not service roads within the City of Midland.[36] Therefore, he was of the opinion that the norm of equal population districting was inappropriate for the Commissioners Court; he stressed the need for a standard that had the "latitude of prescription" necessary to accommodate "the complexities of local government."[37] The *Hadley* popular election test has no latitude; it is an overinclusive, "blanket" test, which does not possess the analytical flexibility to draw distinctions among the needs of citizens for representation in different local structures with variable impacts.

Under a third test, used by the Court in cases involving voter restrictions rather than malapportionments in districting, the mere existence of a restriction subjects the arrangement to strict scrutiny.[38] Like the popular-election test, this method sets up a blanket rule: The former test mandates equal population districting whenever there is a popular election; the latter triggers the application of strict scrutiny whenever there is a restricted franchise.

The restriction test was used in *Kramer v. Union Free School District*,[39] where the Court applied strict scrutiny to a scheme under which eligibility to vote in school board elections was restricted to residents who owned or leased taxable real property in the school district or who had children in the local schools. Plaintiff was a childless bachelor who lived with his parents. The Court noted that

said: "[I]n an election *open to all*, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." 397 U.S. at 54-55 (emphasis added). This suggests that *Hadley* may be inapplicable to a restricted election.

36. "[T]he Commissioners Court's functions and powers are quite limited, and they are defined and restricted so that their primary and preponderant impact is on the rural areas and residents. The extent of its impact on the city is quite limited." 390 U.S. at 507.

37. "The simplicity of the Court's ruling today does not comport with the lack of simplicity which characterizes the miscellany which constitutes our local governments." 390 U.S. at 499.

38. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 626-27 (1969). For a discussion of the strict scrutiny test, see note 4 *supra*.

39. 395 U.S. 621 (1969).

strict scrutiny of the restrictions was appropriate because "[s]tatutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives."[40] The state of New York claimed that the restrictions limited the franchise to those "primarily interested" in school affairs and that restrictions were necessary to ensure an informed electorate. However, the Court struck down the restriction; it found that, even if the state could limit the franchise to those "primarily interested in school affairs," the statute did not do so with sufficient precision to satisfy strict scrutiny.[41] The Court pointed out that the statute would give a vote to a hypothetical unemployed and unconcerned young man who rented an apartment but paid no taxes and would not allow the plaintiff, who was in fact very concerned with school affairs and paid state and federal taxes, to vote.[42]

Again, like the popular-election test, the *Kramer* test's prime virtues are simplicity of application and assured protection for the disenfranchised citizen.[43] Its disadvantages are twofold. First, it is a rigid test that is difficult to satisfy. Even if the precision requirement is met, a restriction of the franchise to a specially interested group will apparently be upheld only if it is necessary to promote a compelling state interest. Moreover, under *Avery*, the critical decision is made by focusing on the unit's powers and its impacts on citizens generally, while the *Kramer* method, at the strict scrutiny stage, analyzes and compares the interests of specific individuals. The standard of precision required by the latter analysis is very high; the former method, in contrast, can be satisfied by looking at general conditions, rather than at the situations of particular individuals.[44]

40. 395 U.S. at 626-27.

41. 395 U.S. at 632.

42. 395 U.S. at 632 n.15.

43. The application of the strict scrutiny test has almost always resulted in the invalidation of the classification. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); note 4 *supra*. *But see* Schindler v. Palo Verde Irrigation Dist., 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969). That case involved an equal protection challenge to a weighted voting provision in an irrigation district established by special legislative act. Although the case did not involve a restriction of the franchise, the court felt bound by *Kramer* to apply strict scrutiny. The court reasoned that "[a]ny disparity in the statutory grant of the franchise, whether it be in the quantum of influence distributed among voters or in the total denial of franchise to some of its grant to others, must be subjected to close judicial examination." 1 Cal. App. 3d at 837, 82 Cal. Rptr. at 65. The court, nevertheless, upheld the provision, noting that it was "necessary" to further the compelling interest of land reclamation because "[a]bsent the voting qualification provided by the Act, it is doubtful that the District could have been formed or functioned." 1 Cal. App. 3d at 839, 82 Cal. Rptr. at 66.

44. For a critical discussion of this aspect of *Kramer*, see Note, *Limitations on the Franchise and the Standard of Kramer v. Union Free School District No. 15*, 1970 UTAH L. REV. 143. The analysis of *Kramer* and the other restriction cases stimulated many articles suggesting that various voting provisions were invalid. *See, e.g.*, Gaines, *The*

Second, the *Kramer* method is overinclusive, as was the *Hadley* popular-election test. The application of strict scrutiny to all selective enfranchisements without a preliminary inquiry similar to the powers-and-impacts analysis of *Avery* neglects the possibility that, in some restriction cases, it may not be appropriate to give the disenfranchised citizen political influence in the unit or decision in question because he is not affected by that unit or decision to the same degree as are others. For the Court in *Kramer*, however, the presumed possibility that the disenfranchised citizen needs representation was sufficient to trigger the application of strict scrutiny.[45] The Court may have felt that it was not necessary to make an initial inquiry into impacts in restriction cases, as it was in malapportionment cases such as *Avery*, because the total denial of the vote seems a more grievous violation of the right to effective representation than does dilution by malapportionment. However, a restriction on the franchise in an election involving a local government unit the activities of which have varying degrees of impact may be a less serious violation of the interest in representative government than severe malapportionment of districts in a general governing unit. In short, in restriction cases, also, there exists a need for a method that can accommodate this possibility.

Despite the development of the three different tests, one constant factor in the local government voting cases prior to *Salyer* was that the Court struck down any substantial[46] franchise infringement, be it restriction or malapportionment.

The *Salyer* case involved both a restriction of the franchise to landowners, and malapportionment in that votes were weighted according to the value of the land owned by each voter. *Salyer* did not, therefore, fit neatly within the parameters of any of the previous methods. The contested provisions concerned the election of the general governing body—the board of directors—of a water storage

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Right of Non-Property Owners to Participate in a Special Assessment Majority Protest, 20 UCLA L. REV. 201 (1972); Note, *Voting Restriction in Special Districts: A Case Study of the Salt River Project*, 1969 LAW & SOC. ORDER 636; Note, *Annexation Elections and the Right to Vote*, 20 UCLA L. REV. 1093 (1973).

45. *See* 395 U.S. at 626-27.

46. The Court has been willing to tolerate deviation from equality as large as 11.9 per cent, at least in the presence of special circumstances. *See* Abate v. Mundt, 403 U.S. 182 (1971), discussed in text accompanying notes 21-27 *supra*. The *Abate* decision stimulated varying responses by the commentators. *See, e.g.*, Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 146-52 (1971) (favorable); Note, *Reapportionment—Nine Years into the "Revolution" and Still Struggling*, 70 MICH. L. REV. 586 (1972) (unfavorable). The recent decision in Mahan v. Howell, 410 U.S. 315 (1973), suggests that the 11.9 per cent deviation allowed in *Abate* will not be the limit of permissible departures from equality in local electoral districting. *Mahan* upheld a 16.4 per cent variation in the populations of Virginia's state legislative districts. *See* notes 8-9 *supra*; text accompanying note 9 *supra*.

district.[47] The provisions enfranchise only those who own land within the district and allocate one vote to each owner for every 100 dollars (or part thereof) of assessed valuation of his land.[48] Landowners who live outside the district may vote, while district residents may not vote unless they own land.[49] Corporate landowners can also vote.[50] Landholdings vary immensely in size, and, at the time of the suit, four corporations owned eighty-five per cent of the total assessed value of the district.[51]

The directors' main function is to plan and supervise projects for the storage and distribution of water for irrigation,[52] although they also have powers with regard to drainage, flood control, and the generation of hydroelectric energy.[53] After a project plan has been drawn up by the directors and approved by the state,[54] it is submitted to district landowners for approval. At this election, which, like the election of the board, is restricted to landowners, the project must receive not only a majority of the assessed value votes, but also the approval of a majority of the landowners.[55] In order to finance a project, an impartial board of commissioners assesses each separately owned tract according to the benefits that it is to receive from the project.[56]

The Supreme Court upheld both the voting restriction and the weighting provisions in the enabling legislation. As the first step in its analysis, the Court assessed the functions and effects of the water storage district. It concluded that the case fell within the exception delineated in *Avery* and *Hadley* for elections of officials " 'whose

47. The statutory provisions applicable to such water storage districts are CAL. WATER CODE §§ 39000-48401 (West 1966), *as amended* (West. Supp. 1974).

48. CAL. WATER CODE § 41000 (West 1966) provides: "Only the holders of title to land are entitled to vote at a general election." CAL. WATER CODE § 41001 (West 1966) provides: "Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars ($100), or fraction thereof, worth of land, exclusive of improvements, minerals and mineral rights therein, in the precinct."

49. In fact, only a few of the 307 district landowners reside within the district, and most of the 77 district residents own no land themselves and are employees of the large corporate landowners. Brief for Appellee at 22-25, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

50. CAL. WATER CODE § 41004 (West 1966), allows "[a]ny corporation holding title to land within the district . . . to vote through any officer or agent . . . of the corporation."

51. 410 U.S. at 735. One corporate landowner, J.G. Boswell Co., owned land comprising more than half of the assessed value in the district. 410 U.S. at 735.

52. Water storage districts are formed for the limited purpose of storing and distributing water for irrigation. CAL. WATER CODE § 43000 (West 1966).

53. *See* CAL. WATER CODE § 42200 (West Supp. 1974).

54. The State Treasurer is empowered to investigate proposed projects. *See* CAL. WATER CODE §§ 42275, 42300-01, 42500 (West Supp. 1974).

55. CAL. WATER CODE § 42550 (West 1966).

56. CAL. WATER CODE § 46176 (West 1966).

duties are . . . far removed from normal governmental activities and . . . disproportionately affect different groups.' "[57] In support of this conclusion, the Court noted that the district has a limited, functionally specialized purpose—providing water for irrigation—and does not provide "general public services."[58] The Court also emphasized that district activities disproportionately affect one group of citizens—the district landowners, who pay the costs and charges of the projects.[59] Because the case fell within the *Hadley* exception, the elections were not subjected to "the popular election requirements" that were imposed in preceding cases.[60] Essentially, this meant that the provisions were not subjected to strict scrutiny.

Instead, the Court, in the second step of its analysis, considered whether the provisions were " 'wholly irrelevant to achievement of the regulation's objectives.' "[61] It concluded that there was a rational basis for the statute's exclusion of nonlandowners, for its exclusions of lessees, and for its weighted voting scheme.[62]

Justice Douglas, joined by Justices Marshall and Brennan, dissented. The dissent criticized the majority's refusal to subject the voting provisions to strict scrutiny. Justice Douglas said that strict scrutiny was required solely because some residents were excluded from the franchise.[63] Moreover, the dissent concluded that, were strict scrutiny applied, the restriction of the franchise to landowners could not be upheld because landowners as a class are not affected by district activities to such a greater degree than are nonlandowners that the owners alone should have the vote.[64] The dissent would also have invalidated the weighted voting provision; it asserted that "when it comes to the performance of governmental functions all enter the polls on an equal basis."[65] Justice Douglas criticized the majority's finding that the unit fell within the *Hadley* exception. He noted that the "Tulare Lake Basin Water Storage District surely performs 'important governmental functions' which 'have sufficient

57. 410 U.S. at 727-28, *quoting* Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

58. 410 U.S. at 728-29.

59. 410 U.S. at 729.

60. 410 U.S. at 730.

61. 410 U.S. at 730, *quoting* Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552, 556 (1947).

62. 410 U.S. at 734-35.

63. The basis for the minority's choice of test was that "[p]rovisions authorizing a selective franchise are disfavored, because they 'always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.' " 410 U.S. at 736, *quoting* Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

64. "[I]rrigation, water storage, the building of levees, and flood control, implicate the entire community. All residents of the district must be granted the franchise." 410 U.S. at 738.

65. 410 U.S. at 739.

impact throughout the district.' "[66] In addition, he strongly criticized the enfranchisement of the corporate landowners.[67]

The test developed by the majority in *Salyer* is more flexible than the dissent thought permissible, given the requirements of the Constitution. It consists of two stages. First, the Court looks to the general or special purpose of the local unit and the uniformity or disparity of its effects on different constituent groups. If the duties of the unit are "far removed from normal governmental activities"[68] and there is a disproportionate effect, the Court proceeds to a second stage, at which it asks whether there is a rational basis for the voting infringements. By implication, if the duties of the unit are more normal or the impact is not disproportionate, infringements on the franchise are subjected to strict scrutiny to determine if they are justified by a compelling state interest. Infringements that fail to pass the second-stage tests violate the equal protection clause of the Constitution. Although *Salyer* involved a restriction, as well as a weighted voting scheme, the first stage of the method used in *Salyer* is a direct outgrowth of the powers-and-effects analysis used by the Court in *Avery*, a malapportionment case. The language used in *Salyer* is the converse of that used in *Avery*: While *Avery* asked whether the unit had "general governmental powers"[69] and a "broad range of impacts on all citizens,"[70] the *Salyer* Court asked if the elected officials exercised duties that are "far removed from normal governmental activities"[71] and "disproportionately affect different groups."[72]

Like *Avery*, *Salyer* does not propose a blanket test. Rather, it attempts to define those cases in which a structure in accord with one person–one vote and the unrestricted franchise is not the most appropriate solution to the representational problem. Again like the test applied in *Avery* to a malapportionment case, this method focuses on the nature of the individual-institutional link by inquir-

66. 410 U.S. at 740.

67. It is indeed grotesque to think of corporations voting within the framework of political representation of people. Corporations were held to be "persons" for purposes both of the Due Process Clause of the Fourteenth Amendment and of the Equal Protection Clause. Yet, it is unthinkable in terms of the American tradition that corporations should be admitted to the franchise. Could a State allot voting rights to its corporations, weighting each vote according to the wealth of the corporation? Or could it follow the rule of one corporation, one vote?

It would be a radical and revolutionary step to take, as it would change our whole concept of the franchise.

410 U.S. at 741-42.

68. 410 U.S. at 727-29.

69. 390 U.S. at 485.

70. 390 U.S. at 483.

71. 410 U.S. at 727-29.

72. 410 U.S. at 729.

ing whether all citizens are affected in ways that are sufficiently uniform that each citizen should have equal representation. In extending this approach to *Salyer*, which also involved a restriction, the Court relaxed the prior rigid approach[73] it had taken in restriction cases.

Although the *Salyer* method attempts to be selective in the application of the strict scrutiny test and has a valuable flexibility, it also has serious flaws. Specifically, its first-stage analysis does not, either in its formulation or in its application, accurately detect when the interest in effective representation is significantly impaired. In particular, the inquiry at this stage into the powers possessed by the unit lacks predictive value and asks a question that is basically irrelevant to the need of potential voters for representation. The question asked by the Court was whether the duties of the unit or official in question are "far removed from normal governmental activities."[74] The Tulare Lake Basin Water Storage District met this test because it does not provide "general public services such as schools, housing, transportation, utilities, roads or anything else ordinarily financed by a municipal body."[75] To fulfill this element, then, the primary requirement seems to be that the unit in question be functionally specialized or unusual, but whether a unit provides an unusual or

73. This shift away from a rigid approach to problems involving voter restrictions parallels the Court's action in another equal protection case decided in the same term —San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). *Rodriguez* involved a claimed right to equal treatment in educational financing. Like *Salyer*, *Rodriguez* seemed concerned with the readiness of the Court in other equal protection cases to apply strict scrutiny without first examining the appropriateness of such a rigorous standard. *Rodriguez* was brought on behalf of poor and minority children who lived in school districts with low property tax bases. The appellees claimed that these children as a class were discriminated against by the state's system of school financing, which allowed substantial interdistrict disparities "largely attributable to differences in the amounts of money collected through local property taxation." 411 U.S. at 16. The Court had previously said that classifications based on wealth have been "traditionally disfavored." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). The district court, relying on this suggestion, found the classification in *Rodriguez* to be suspect and thus subject to strict scrutiny. Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971). However, the Supreme Court refused to apply strict scrutiny and urged that a less facile analysis than that employed by the district court be used:

> Rather than focusing on the unique features of the alleged discrimination, the courts in these cases [lower court decisions involving school financing laws] have virtually assumed their findings of a suspect classification through a simplistic process of analysis . . . . Before a State's laws and the justifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely.

411 U.S. at 19. The "threshold" questions in *Rodriguez* included "whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence." 411 U.S. at 19.

74. 410 U.S. at 727-28, *quoting* Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

75. 410 U.S. at 728-29.

specialized service should not be determinative in an evaluation of the constitutionality of the related voting scheme. The critical question is, rather, whether the impact on the citizens is so uniform that each citizen should participate equally in political decision-making. The "far removed" test does eliminate from closer consideration infringements in elections for units with a broad (but indeterminate) range of functions that fall under the rubric of "general public services" and thus affect every citizen in important ways. However, this selection can be made more effectively by looking *directly* at the effect of the functions, as the second, or "disproportionate effects," element of the first stage of the *Salyer* test does. Moreover, the close association of the "far removed" test with the "disproportionate effects" test in the language of the Court may encourage a tendency to presume that, if a unit does engage in activities not normally provided by a governmental unit, its impact will be disproportionate. This tendency is indicated by the Court's failure clearly to describe its inquiry as looking first to powers and then to effects. Instead, in *Salyer*, as in *Avery* and *Hadley*, the Court, describing the general rule and its exception, posed the choice as between a unit with specialized powers and disproportionate effects and a unit with general powers and equalized effects and ignored the possibility of a unit with specialized powers but equalized effects. This may lead the Court, when it considers the effects element, to seize upon any disproportionate effects that exist and to downplay more generalized public interests, such as that of flood control in *Salyer*.[76]

That a specialized function can have a significant general importance and may even be fairly usual within a given part of the country is also illustrated by *Salyer*. Justice Rehnquist found that the water storage district performed a service that was "far removed from normal governmental functions." But, in the Western states, including California, the supply of water for irrigation is essential to local economies, and governmental units that perform this function have proliferated.[77] In an agricultural area such as that in which the Tulare Lake Basin Water Storage District is located, a water storage district may be one of the most important local governmental units in terms of budget and service to the residents. The "far removed" test as applied here ignores the context in which the unit in question operates.

The analysis of the second element of the first stage in *Salyer* is similarly superficial. This element properly focuses on the effects of the unit on the citizenry. However, as phrased and applied, it only

76. *Compare* 410 U.S. at 728-29 n.8 *with* 410 U.S. at 737-38 (Douglas, J., dissenting).

77. J. BAIN, R. CAVES & J. MARGOLIS, THE WATER INDUSTRY OF NORTHERN CALIFORNIA (1969). Justice Rehnquist does seem to acknowledge the essential nature of water programs in the Western states. *See* 410 U.S. at 721-23.

detects any disparity in the importance and intensity of the effects on one group as compared to another. The Court did not examine the interests of the disenfranchised voters independently, but only by comparison with the interests of the landowners. It would seem that, regardless of the disparity of interest levels between two groups, any group that is interested in the unit in an important way should not be denied representation. Although it would, in essence, require the Court to articulate an absolute minimum standard by which to measure the interests of different groups, such a method would provide a more sensitive mechanism to detect significant impairments of the right to representation.[78]

Moreover, the Court in *Salyer* took a narrow and shallow view of the interests to be considered in analyzing the relative effects of the water storage district on various citizen groups. The question of whether a group is "disproportionately affected," as the Court phrased it in *Salyer*, is very similar to the question that the Court considered in an earlier case involving a voting restriction in a local election. In *Phoenix v. Kolodziejski*,[79] the Court framed the question as whether the difference in interests between the enfranchised and disenfranchised citizens was "sufficiently substantial to justify excluding the latter from the franchise."[80] Applying strict scrutiny in accordance with the *Kramer* approach to restriction cases, the Court held invalid legislation that limited the franchise to property owners in a referendum to authorize the issuance of general obligation bonds to finance the improvement of municipal services. Although the question asked by the Court was essentially the same as that asked by the "effects" element of *Salyer*, the Court in *Phoenix* gave weight to certain interests that the *Salyer* Court belittled. For example, one reason the Court gave for its conclusion in *Phoenix* was that, although the debt would be serviced in part by real property taxes, a significant part of the ultimate burden of the property

78. It could be argued that, in restriction cases, the Court had decided that, when a citizen has some basic level of interest in the functions of a governmental unit, he cannot be denied representation even though others have substantially greater interests. In City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), the Court said: "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." 399 U.S. at 209. However, the holdings in restriction cases such as *Phoenix* centered on the challenged statutes' lack of precision in distinguishing those who were "primarily interested" from those who were not. *See, e.g.*, Cipriano v. City of Houma, 395 U.S. 701, 704-06 (1969); Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969). The Court's findings that the statutes lacked precision cannot be readily viewed as establishing that when a citizen's stake in a unit rises to a threshold level he cannot be denied representation in the unit. The Court in the restriction cases, as in *Salyer*, still seems concerned with disparities, rather than with absolute levels. *See also* text accompanying note 80 *supra*.

79. 399 U.S. 204 (1970).

80. 399 U.S. at 209.

tax would be passed on to lessees, so that any increase in property taxes due to bond assessments would be reflected by somewhat higher rents.[81] The Court also mentioned that property taxes on businesses would be passed on as a cost of doing business to all residents (not just property owners) who buy products or services produced in the city.[82]

In contrast, the *Salyer* Court, in concluding that district landowners were "disproportionately affected" by district activities, stressed that they bore the project costs in the first instance.[83] While this is accurate, it does not trace the transfer of a part of the burden to lessees, an important part of the strict scrutiny analysis in *Phoenix*. The Court in *Salyer* refused to consider seriously one of the arguments that the Court had found convincing in *Phoenix*:

> No doubt residents within the District may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost of doing business for those who farm within it, and that cost must ultimately be passed on to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise "affected" by the activities of the district. Constitutional adjudication cannot rest on any such "house that Jack built" foundation . . . .[84]

While this argument may indicate that *Phoenix* went too far in tracing the economic burden, it is equally inappropriate to focus on the initial incidence of costs and completely disregard easily discernible secondary economic impacts.[85]

The *Salyer* analysis is also superficial in that it focuses on specific economic effects and fails to consider other important interests that may be affected by the activities of the local unit. First, *Salyer* ignores more diffuse effects. In *Phoenix* the Court struck down the

81. The proportion of property tax that a lessee bears is determined by the demand for rental property. If demand is very high, a higher proportion of the tax can be passed on. 399 U.S. at 210 n.6, 211 n.8. *See also* D. NETZER, ECONOMICS OF THE PROPERTY TAX 32-40 (1966).

82. 399 U.S. at 211.

83. 410 U.S. at 729.

84. 410 U.S. at 730-31.

85. The *Phoenix* Court may have selectively emphasized those factors that supported the result it desired to reach. For example, the Court discounted one economic burden that would have supported the franchise restriction; although the bond assessments could become liens on the landowner's property if not paid, the Court refused to take this into account because there was no demonstrated possibility of foreclosure. 399 U.S. at 212. Of course, assessments in water storage districts become liens on the land. *See* CAL. WATER CODE § 46280 (West 1966). The *Salyer* Court attached considerable importance to these liens: "The California Legislature could quite reasonably have concluded that the number of landowners and owners of sufficient amounts of acreage whose consent was necessary to organize the district would not have subjected their land to the lien of its possibly very substantial assessments unless they had a dominant voice in its control." 410 U.S. at 731.

restriction to landowners in part because all residents were affected by the quality of municipal services.[86] The *Kramer* appellant's interest in school board activities was not explicitly defined by the Court, but the Court did mention that he was "affected by school board decisions";[87] since the appellant had no children in school and did not pay property taxes, this effect must have been more indirect—perhaps in the sense that all citizens have an interest in the existence of a good school system and a well-educated citizenry. While it is true that the primary services of the water storage district before the Court in *Salyer* directly benefit only landowners, district activities also have impacts of a more diffuse nature. Flood control activities affect every district resident, and all district projects have a general effect on the local economy. Yet, these more generalized impacts were not given any weight.

Second, the *Salyer* Court ignored noneconomic effects, such as the subjective element of personal interest in the unit's activities. Again, in *Kramer* the Court considered this to be an important consideration.[88] Although the appellant in that case apparently just asserted that he was interested in local school affairs,[89] the Court seems to have considered this interest weighty enough to offset the fact that he did not bear any tangible economic burden in the form of school-related taxes.[90]

This analysis of the first stage of the *Salyer* method reveals that, while that stage has the flexibility needed to evaluate mechanisms designed to resolve representational problems in local government, as applied in *Salyer* it does not focus sufficiently on the critical question of impact on the citizenry. Since the outcome of this stage may be determinative of the entire case,[91] the Court should make a more careful and considered analysis. The superficial application of the test in *Salyer* has been shown to have left a large margin for error.

Because the water storage district was found to fit both elements of the first stage, the Court did not subject the justifications for franchise infringements to strict scrutiny at the second stage, but

86. 399 U.S. at 209.

87. 395 U.S. at 632 n.15.

88. 395 U.S. at 632 n.15. It has been suggested that the *Kramer* personal-concern analysis would render invalid any franchise restriction. *See* Note, *Equal Protection Standards and Franchise Restrictions*, 83 HARV. L. REV. 77, 77-86 (1969).

89. 395 U.S. at 640-41 (Stewart, J., dissenting).

90. 395 U.S. at 632 & n.15. It seems clear that, since the hypothetical, unemployed young man mentioned by the Court rented an apartment, he paid a "passed-on" property tax, while the appellant bore no such financial burden. Yet, the *Kramer* Court characterized the hypothesized man's interest as "remote and indirect" and the appellant's as "primary and direct." The subjective element seems to be the difference that accounts for this treatment.

91. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); note 4 *supra*.

rather applied the less rigorous reasonableness test. Under this analysis the Court is solicitous of the state's justifications and thus gives the state the flexibility that the Court has, in some cases, properly recognized might be needed to deal with local problems.[92]

Close analysis indicates that the justifications accepted under this standard of review were somewhat weak. Some of the problems considered cursorily at this stage should have been weighed more carefully in the first-stage analysis. Others, particularly those in regard to which the Court neglects to consider the existence of less onerous methods of solving the local unit's problems, reflect the deliberate choice in favor of local flexibility made by the Court in reaching its conclusion at the first stage. The Court's second-stage examination of the water district voting scheme in terms of the rational basis test will be considered at some length. This is not to say that there were no rational bases to be found for the voting provisions before the Court in *Salyer*. But a close look at the Court's reasoning demonstrates the extensive freedom that the Court left to state decision-makers.

The Court decided that the state could properly exclude all nonlandowners from the franchise because landowners bear the entire burden of the district's costs in the first instance.[93] This is a reiteration of the point made by the Court in its first-stage analysis of the unit's effects, and it contains the same flaw of focusing only on the initial incidence of direct economic costs.[94]

The three justifications[95] accepted by the Court in upholding as rationally based the exclusion of lessees from the franchise[96] are even less persuasive. First, the Court expressed a fear that the enfranchisement of lessees would allow large landowners to gain more votes by

92. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 485 (1968): "This Court is aware of the immense pressures facing units of local government, and of greatly varying problems with which they must deal. The Constitution does not require that a uniform straightjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." Similarly, the Court noted, in Sailors v. Board of Educ., 387 U.S. 105, 110-11 (1967): "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

93. 410 U.S. at 731.

94. *See* text accompanying notes 79-85 *supra*.

95. In addition to these justifications the Court noted that lessees could protect themselves politically by negotiating voting rights in their leases, thus mitigating the effect of the statutory exclusion of lessees. 410 U.S. at 733. In the Tulare Lake Basin Water Storage District, large landowners lease the tracts of small landowners and vote these tracts as proxies. Brief for Appellee at 9, Salyer v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

96. 410 U.S. at 731-33. The Court admitted that "[l]essees undoubtedly do have an interest in the activities of appellee district analogous to that of landowners in many respects." 410 U.S. at 732. Aside from the fact that district assessments are passed on to lessees, *see* 410 U.S. at 731-32, lessees also are users of district services. 410 U.S. at 731.

leasing small parcels to loyal employees.[97] Since this problem would not arise under a weighted voting scheme where the land's allocation can only be voted once, the Court apparently assumed another means of allocating the vote, such as a per capita method. Even then, this potential abuse could easily be prevented by a statutory provision requiring lessees actually to farm the land if they are to be allowed to vote. Second, the Court noted that the state might have felt that landowners would be unwilling to support water storage districts if short-term lessees with less embedded interests in the area were given a strong voice in district affairs.[98] If the goal that the Court had in mind was only the successful formation of water storage districts, rather than the formation of water storage districts that have the wholehearted support of landowners, this fear seems unfounded. The state might have created a statutory scheme that allocated votes in formation elections on a per capita basis, so that districts could be formed by a majority of residents, even without the votes of the landowners. If the Court was concerned, rather, with the possibility that a lack of landowner support could prevent the passage by the state legislature of any water storage district enabling legislation that would enfranchise lessees, it might be argued in response that, if the Court were to require that lessees be allowed to participate, landowners would probably support such legislation rather than do without water storage districts entirely. Finally, the Court noted that the inclusion of lessees would present an administrative problem, because voting lists are prepared from assessment rolls, which do not record leases, as well as from state and federal land lists.[99] A voter registration procedure would avoid this difficulty.

The Court's handling of the weighted voting provision deserves considerable attention. It is the part of the holding that most aroused the ire of the dissent,[100] and it best demonstrates the complex problems that arise in establishing local units that serve special purposes. The Court found that there was a rational basis for the weighted voting provision because " 'the benefits and burdens to each landowner . . . are in proportion to the assessed value of the land.' "[101]

97. 410 U.S. at 732.

98. 410 U.S. at 732.

99. 410 U.S. at 732-33.

100. *See* 410 U.S. at 741-42.

101. 410 U.S. at 734, *quoting* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 342 F. Supp. 144, 146 (E.D. Cal. 1972). The issue of weighted voting has arisen in a variety of contexts in other California litigation. *See, e.g.*, County of Riverside v. Whitlock, 22 Cal. App. 3d 863, 99 Cal. Rptr. 710 (1972) (upholding weighted voting in a municipal improvement "majority protest" scheme); Schindler v. Palo Verde Irrigation Dist., 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969) (upholding weighted voting system of irrigation district). *Contra*, Curtis v. Board of Supervisors, 7 Cal. 3d 942, 501 P.2d 537,

This justification, although reasonable, glosses over several difficult issues.

The weighted voting scheme in *Salyer* is a mechanism for distributing influence and making decisions that can be analogized to the corporate form, which allocates votes on a per share, rather than per capita, basis. In both cases, the influence allocated to a person is linked to the economic contribution that he has made to the entity. That contribution takes the form of assessments in the water storage district and of the purchase of shares in the corporation. The economic benefit that a person receives is also in proportion to his contribution; more returns in the form of dividends accrue to those with more shares in a corporation, while more water services are provided to those with more acres (and thus larger assessments) in the water storage district. Moreover, in both the water storage district and the corporation, the decision-making apparatus allocates little or no direct influence to certain interests affected by the unit. In a corporation, for example, consumers and employees usually have no direct representation; similarly, the water storage district legislation in *Salyer* denies any voice to nonlandowners.

Considerations of fairness and economic efficiency underlie the weighted voting structures of both the corporation and the water storage district. Economic theory demands that the owners (or shareholders) of a corporation make the corporate decisions.[102] The owners bear the losses and reap the benefits produced by the firm. Motivated by the self-interest of maximizing their individual economic gains, the owners can thus be trusted to seek to maximize firm profits. It is equitable that, among the owners, influence in management decisions be apportioned according to the losses and profits that will result to each owner as a consequence of those decisions.

The water storage district, like the corporation, is engaged in the production of an economic good or service. However, the district differs from the corporation in that the landowners, who support the district by paying assessments and user charges and are thus analogous to shareholders, are also consumers of the district's services, a position not necessarily occupied by corporate shareholders. The district is a "user cooperative," the dominant economic purpose of

104 Cal. Rptr. 297 (1972) (striking down weighted voting protest provision in city formation proceedings); Burrey v. Embarcadero Municipal Improvement Dist., 5 Cal. 3d 671, 488 P.2d 395, 97 Cal. Rptr. 203 (1971) (striking down weighted voting in an improvement district created by special legislative act).

102. *See* Hetherington, *Fact and Legal Theory: Shareholders, Managers and Corporate Responsibility*, 21 STAN. L. REV. 248, 250 (1969). As Professor Hetherington points out, however, the entrepreneurial function is now performed by management rather than by the shareholders. *Id.* at 251-55. *See also* Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decision-Making*, 57 CALIF. L. REV. 1 (1969).

which is not the maximization of its profits but the maximization of the economic welfare of the individual members through the provision of district services at the lowest possible cost per unit output. Thus, because, like shareholders, district landowners feel the direct effects, good or ill, of district decisions, provision of the district's services at the lowest per unit cost will presumably be best ensured if they make the decisions. Similarly, it is only fair that those who stand to gain the most from the efficiency of the district in providing services should have the commensurately greater influence provided by a weighted voting scheme.[103]

Perhaps these considerations underlay the Court's emphasis on the economic nexus. Some of the arguments that may justify corporate representation schemes seem to appear in altered form in the *Salyer* decision to support weighted voting. Allocation of votes according to investment in the corporation should theoretically be an incentive for large investments in a corporation's securities, for the large investor is assured that, although his risk increases with the amount of his investment, his influence over corporate policy, and his possible gains from corporate profits, rise commensurately.[104] A similar argument is one possible justification for the weighted voting scheme in *Salyer*. The Court noted that the exclusion of lessees could have been motivated by a need to assure landowners that they would have a dominant influence, in order to gain their support for the formation of the water storage district.[105] Weighted voting could similarly be justified as an inducement to large landowners, without whose support districts would be unlikely to be able to function effectively.[106]

However, there is an element of coercion in the formation of water storage districts that is not present in the purchase of corporate stock, for the district is a governmental unit and a landowner can be made a member of the district and subjected to its assessments even if he does not vote for district formation or voluntarily join after the election.[107] There are safeguards for involuntary partici-

103. For an elaboration of the theory of user cooperatives, see J. BAIN, R. CAVES & J. MARGOLIS, *supra* note 77 at 276-84.

104. This argument is somewhat weakened by the extent to which most corporate decisions are made by management rather than shareholders. *See* Eisenberg, *supra* note 102.

105. 410 U.S. at 732.

106. *See* Schindler v. Palo Verde Irrigation Dist., 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969), discussed in note 43 *supra*. The court relied on a similar argument in upholding a weighted voting scheme under the strict scrutiny test.

107. Water storage districts can be initiated by a petition of the owners of a majority in land value of the land in the proposed district or of 500 landowners with title to at least 10 per cent of the land in the proposed district. CAL. WATER CODE § 39400 (West 1966). This petition, which must set forth details of the district proposal, is submitted to the California Department of Water Resources, which must make an order deter-

pants. A landowner is entitled to a hearing regarding the assessment against his land in order to assure that it is in proportion to the benefit that his land will receive from a project.[108] Individual projects require the approval of a majority of both the individual landowners' votes and the assessed value votes.[109] Moreover, the power of the State Treasurer to investigate proposed projects[110] may provide some protection against abuse by the majority. However, no provision allows minority landowners to influence directly the types of projects considered by the board of directors. In short, the small landowner will always be in a defensive position.

Weighted voting does enable strong private economic interests to use public authority to increase their resources and power.[111] Where large landholding corporations exist, they can use the resources and tax base of the entire water storage district to build projects that, while possibly of some benefit to the small landowners, particularly benefit the larger landowners. The dissent pointed out that the convergence of private interests and public authority in the Tulare Lake Basin Water Storage District had, on occasion, assumed serious dimensions. For instance, in 1969, the district board refused to activate the flood control machinery because to have done so would have flooded the nearby agricultural lands held by the dominant landowner, the J. G. Boswell Co.[112] In most cases, weighted voting will not give small landholders any representation at all. Representation in proportion to their small interest will not occur, for the directors will serve as representatives of the large landholders that elected them. Although small landowners can get some effective representation in areas where they hold the balance of power between competing and equally balanced landholders, one large corporation will often be dominant, as in *Salyer*, or the large landowners will have a solid community of interest, which will leave no balance-of-power role for small landowners.[113]

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mining the practicability, feasibility, and utility of the project. CAL. WATER CODE §§ 39775-800 (West 1966). The issue of formation is then submitted to the qualified voters. CAL. WATER CODE § 39927 (West 1966), provides that the provisions applicable to the general elections for the board of directors (section 41000, which restricts the franchise to landowners, and section 41001, which provides for weighted voting) are applicable to the formation election "as nearly as practicable." *See generally* note 48 *supra*.

108. CAL. WATER CODE § 46225 (West Supp. 1974).

109. *See* text accompanying note 55 *supra*.

110. *See* note 54 *supra*.

111. For an interesting study of how private economic interests used California special district enabling legislation to finance improvements to real estate development projects, see Willoughby, *The Quiet Alliance*, 38 S. CAL. L. REV. 72 (1965). *See also* Cooper v. Leslie Salt Co., 70 Cal. 2d 627, 451 P.2d 406, 75 Cal. Rptr. 766 (1969).

112. 410 U.S. at 737.

113. The California statute provides that water storage districts are to be divided into divisions, "so as to segregate into separate divisions lands possessing the same gen-

Although weighted voting creates the clear possibility of the misuse of public power by private economic interests, it would not seem to be constitutionally invalid on the ground that it distributes voting rights on the basis of wealth, as appellants argued in the *Salyer* case.[114] The Supreme Court has, in several cases, viewed the use of wealth-related classifications unfavorably.[115] However, its refusal to accept appellants' argument was not unfounded. First, although votes in the water district are distributed on the basis of landholding, there is not a necessary correlation between the wealth of each district landowner and the amount of land he owns. Second, at least in theory, the weighted voting provision does not totally deny any landowner, no matter how poor, a voice in district affairs. In *Rodriguez* the Court found that there was no unconstitutional discrimination on the basis of wealth against students who live in less wealthy school districts, because they were not totally denied an education.[116]

Measuring a voter's interest purely in terms of his economic stake neglects any subjective personal interests that the voter might have. The courts have not been oblivious to these claims. The Supreme Court affirmed a district court decision striking down a Louisiana statutory scheme that allowed only property owners to vote in bond authorization elections and allocated votes in proportion to the value of each voter's land. The district court noted that "there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more than a hundred thousand dollar house to another."[117]

The analysis by the *Salyer* Court under the rational relationship test suffered from the same focus on economic matters that characterized the analysis under the effects element of the first stage,[118] and some of the justifications accepted by the Court were less than strong. When the Court concluded, under the first stage, that the Tulare

eral character of water rights or interests in the water of a common source." CAL. WATER CODE § 39777 (West 1966). No directors are elected by the district at-large; rather, one director is elected by each division to represent that division. CAL. WATER CODE § 39929 (West 1966). Small landowners could be represented if they were concentrated in one division and could control the election of that division's director.

114. 410 U.S. at 733-34.

115. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1970). *See also* McDonald v. Board of Election Commrs., 394 U.S. 802, 807 (1966): "[C]areful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect . . . ." *Harper* also involved the fundamental interest in voting, so that the decision did not rest on the wealth classification alone.

116. 411 U.S. at 29-39.

117. Stewart v. Parish School Bd., 310 F. Supp. 1172, 1179 (E.D. La.), *aff'd. per curiam*, 400 U.S. 884 (1970).

118. *See* text accompanying notes 88-90 *supra*.

Lake Basin Water Storage District should be evaluated under the rational relationship test, it had finished the most rigorous part of its analysis. The state was then given not indefinite, but certainly wide, discretion in its choice of representational structures. Strict scrutiny would have, for instance, allowed the consideration of possible alternative organizational schemes that would give more protection to the interests of small landowners.[119] Possible alternatives include the appointment, rather than the election, of directors;[120] in that case the board may not as inevitably represent large landed interests. Another alternative would be to give every landowner one vote, as is done in California irrigation districts.[121] However, a relatively superficial analysis of alternative means is a cost of the flexibility that is left to the state through the adoption of the rational relationship approach. Other problems ignored by the Court—such as the protection of the landless and the small landowner, and the importance of noneconomic interests—were not sufficiently considered at the first-stage analysis of the unit's effect on the local citizenry. Their reappearance at the second stage again suggests that the earlier analysis was not made with sufficient care.

The Court's analysis at the first stage could be seen as a means of detecting whether the constitutional right to representation has been appreciably infringed, or—as *Salyer* may also be interpreted—whether the complainant has any constitutional right to representation in the particular circumstances. If the infringement is relatively insubstantial or the right does not exist under the circumstances, the state is free to form its institutions in the way that it finds most suitable.[122]

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119. When classifications abridging fundamental interests are subjected to strict scrutiny, the Court typically inquires into alternative methods of achieving the state's interests. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 351-52 (1972); Shapiro v. Thompson, 394 U.S. 618, 636-38 (1969). *Cf.* Vlandis v. Kline, 412 U.S. 441, 451-52 (1973). *See also* Note, *Developments in the Law—Equal Protection*, *supra* note 4, at 1122.

120. If an official is appointed, the equal protection standards required for elections are inapplicable. *See* Sailors v. Board of Educ., 387 U.S. 105 (1967), discussed in note 13 *supra*.

121. CAL. WATER CODE § 21557 (West 1956). In addition to water storage districts, both California water districts, CAL. WATER CODE § 35003 (West Supp. 1974), and reclamation districts, CAL. WATER CODE § 50704 (West 1966), have voting schemes weighted according to land value.

122. This type of analysis is illustrated by Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.), *aff'd. mem.*, 399 U.S. 901 (1970). Plaintiffs challenged a provision of Colorado's annexation statute that permitted municipalities unilaterally to annex areas that have at least two thirds of their perimeter contiguous with the municipality. Plaintiffs alleged that the denial to the residents of those areas of the right to vote on the annexation was a denial of equal protection, since annexation of areas that were less than two-thirds contiguous with a municipality required the approval of the residents of the area to be annexed. The court rejected the assertion that the prior voting cases required application of strict scrutiny: "[I]t does not appear that the plaintiffs' rights are of the kind that have been upheld by the Supreme Court. The factor present

However, the *Salyer* decision can also be read as a positive affirmation of the state's ability to design the most appropriate organs of local government. In dicta in earlier cases the Court has been solicitous of institutional experimentation at the local level.[123] The importance of the need for experimentation is difficult to weigh against the possible harms to disenfranchised individuals in cases like *Salyer* because the need is intangible, but the growing chorus of pleas for relief from the doctrine of one person–one vote[124] indicates its reality.

Indeed, it might be suggested that the first-stage analysis developed in *Salyer* can be used not only to select those situations in which the constitutionally protected right of certain groups to representation is relatively insignificant or nonexistent, but also to select those situations in which the state should be allowed to design suitable representational institutions because local flexibility is very important. *Salyer* presents as clear a situation as is likely to arise in which a substantial departure from one person–one vote is justifiable. However, it can be expected and hoped that the Court will further refine its application of the first analytic stage so that those interests that were neglected or slighted in *Salyer* receive more careful attention.

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in the cited cases which appears to have been crucial is that the franchise was granted to one group of persons to the detriment of another group." 308 F. Supp. at 1403. The court upheld the provision under the rational relationship test.

Adams and Sailors v. Board of Educ., 387 U.S. 105 (1967), *see* note 13 *supra*, indicate that the total denial of the right to an election on certain matters does not infringe upon a fundamental right. The extension made by *Salyer* is that the Court found that neither restrictions on the franchise nor weighted voting abridged a fundamental right even when an election was provided.

123. *See* note 92 *supra*.

124. *See* note 15 *supra*; Note, *The Impact of Voter Equality on the Representational Structure of Local Government*, 39 U. CHI. L. REV. 639 (1972).